U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-T-L-, INC.

DATE: SEPT. 24, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a telecommunications technology company, seeks to employ the Beneficiary as a senior business intelligence web developer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the labor certification was not valid because the offered position is not in the same metropolitan statistical area (MSA) as that listed on the labor certification. On appeal, the Petitioner submits additional evidence and asserts that the labor certification is valid.

Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is September 13, 2018. *See* 8 C.F.R. § 204.5(d).

II. VALIDITY OF LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). If a petitioner intends to employ a beneficiary outside the stated area of employment, USCIS may deny the petition. *Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979). The regulation at 20 C.F.R. § 656.3 defines area of intended employment as the area within normal commuting distance of the place of intended employment.

On the labor certification, the Petitioner listed the place of intended employment as its headquarters in California. However, on the petition, it listed the place of intended employment as the Beneficiary's home address in New Jersey.[2] The Director concluded that the labor certification was not valid because the location of the offered position on the petition is not in the same MSA as that listed on the labor certification. Although the labor certification stated that telecommuting would be available for the position, the Director determined that the Beneficiary's home address is outside the California MSA. The Director stated that because the labor certification did not mention the Beneficiary's intention to work from her home in New Jersey, the DOL was not informed of the Beneficiary's intent to work there, and thus the labor certification was not valid.

On appeal, the Petitioner asserts that the DOL requires the company's headquarters location to be listed as the worksite for telecommuters, and that it properly listed its headquarters in California as the proposed worksite on the labor certification.[3] It states that there is no regulation or other guidance requiring the Petitioner to specifically inform DOL that the Beneficiary might work from her home in New Jersey. By giving notice on the labor certification that telecommuting is permitted, and by listing the Beneficiary's home address in New Jersey as well as the present and proposed worksite in California on the labor certification, the Petitioner asserts that it properly filed the labor certification and that the labor certification is valid.

We find that the Petitioner properly filed the labor certification from the area of its headquarters in California. At Part H.14. of the labor certification, it clearly advised the DOL that "telecommuting is available for this position." The Petitioner was not required to identify the Beneficiary's potential future telecommuting location(s) on the labor certification. The Petitioner has established that the labor certification is valid. We will therefore withdraw the Director's decision on this issue.

However, as detailed below, we find that the record is insufficient to establish whether the Petitioner has the continuing ability to pay the proffered wage form the priority date. Therefore, we will remand the matter to the Director for further consideration.

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[2] It subsequently amended the petition to reflect the place of intended employment at its headquarters in California.

[3] *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

III. ABILITY TO PAY

The Petitioner must establish its ability to pay the proffered wage from the priority date on September 13, 2018, and continuing until the Beneficiary obtains lawful permanent residence.[4] In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The regulation further provides that if a petitioner employs 100 or more workers, we may accept a statement from a financial officer of the petitioner which establishes its ability to pay the proffered wage. In this case, the Petitioner submits a letter from its corporate treasurer indicating that at the end of 2017, it "and its group affiliates had well over 5,000 employees worldwide, with more than 800 employees in the United States."[5] It lists the 2017 consolidated gross annual income and current assets for it and its group affiliates, and the expected consolidated totals in 2018.

Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other enterprises cannot be considered in determining the Petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The treasurer's letter lists the combined employment of the Petitioner and its group affiliates and, therefore, the letter does not establish that the Petitioner itself employs 100 or more workers.

In addition, USCIS records indicate that the Petitioner has filed dozens of Form I-140 petitions. If a petitioner has filed multiple Form I-140 petitions, it must establish its ability to pay the proffered wages of all of its Form I-140 beneficiaries.[6] Consequently, we must also take into account the Petitioner's ability to pay the Beneficiary's wage in the context of its overall filings. Given the deficiency in the letter regarding the number of employees employed by the Petitioner and the Petitioner's history of filing petitions, we decline to exercise our discretion to accept the letter from corporate treasurer as evidence of the Petitioner's ability to pay the proffered wage.

As we decline to rely on the letter from the Petitioner's corporate treasurer, we will examine the other financial documentation submitted. The Petitioner submitted the 2017 annual review of [redacted], and several pages from the 2016 and 2017 audited financial statements of [redacted] and subsidiaries. However, the record does not contain regulatory-prescribed evidence of the Petitioner's ability to pay for 2018. As noted above, the Petitioner cannot rely on the financial results of other entities to establish its ability to pay the proffered wage. On remand, the Director shall clarify whether the Petitioner has the continuing ability to pay the proffered wages of its relevant Form I-140 beneficiaries.[7]

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[4] The annual proffered wage is $102,669.

[5] The letter does not name the Beneficiary.

[6] *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our conclusion that a petition may not be approved where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

[7] The Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition. The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered after the other beneficiary obtains lawful permanent

IV. CONCLUSION

The Petitioner has established that the labor certification is valid. We will therefore withdraw the Director's decision on this issue. However, the Director's decision did not clarify whether the Petitioner has the continuing ability to pay the proffered wages of its relevant Form I-140 beneficiaries. Thus, we will remand the matter to the Director for further consideration.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of G-T-L-, Inc.*, ID# 6348149 (AAO Sept. 24, 2019)

residence; if an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or before the priority date of the I-140 petition filed on behalf of the other beneficiary. We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.